

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 21, 2024

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

KATHY-J: ESPINDA, presenting
herself sui juris,

Plaintiff,

v.

KEN HOHENBERG, and/or his
successor, individually and in his official
capacity as Chairman/CEO of HAPO
Community Credit Union a Corp of
Washington, an ens legis being used to
conceal fraud; JUDGE JOSEPH
BURROWES, and/or his successor,
individually, and in his official capacity
as Benton County Judge, an ens legis
being used to conceal fraud; THOMAS
CROSKREY, and/or his successor,
individually, and in his official capacity
as Benton County Sheriff, an en legis
used to conceal fraud; ANDREW
CLARK, and/or his successor,
individually, and in his official capacity
as Deputy Prosecuting Attorney, an ens
legis being used to conceal fraud,
JAMES KIDDY, and/or his successor,
individually, and in his official capacity
as Pres/CEO of Gotchacar Inc., an ens
legis being used to conceal fraud;

No. 4:23-cv-05155-MKD

ORDER GRANTING
DEFENDANTS BURROWES,
MEYLER, HOHENBERG AND
BERTOLINO'S MOTIONS TO
DISMISS

ECF Nos. 12, 23, 24, 25

MICHELLE BERTOLINO, and/or his
successor, individually, and in his
official capacity as President/Farleigh
Wada Witt., an ens legis being used to
conceal fraud; SAMUEL MEYLER,
and/or his successor, individually, and in
his official capacity as Owner/Meyler
Legal, PLLC., an ens legis being used to
conceal fraud; and JOHN DOES
INVESTORS 1-10,000,

Defendants.

Before the Court are Motions to Dismiss from Defendant Burrowes, ECF No. 12, Defendant Meyler, ECF No. 23, Defendant Hohenberg, ECF No. 24, and Defendant Bertolino, ECF No. 25. Plaintiff filed a response to the motions as well as a second motion to recuse. ECF No. 27. The Court denied the motion to recuse by separate order. ECF No. 28. The Court has considered the motions and the record and is fully informed. For the reasons discussed below, the motions to dismiss are granted.

BACKGROUND

A. Procedural Background

This is the fourth Complaint Plaintiff has filed this year; all the claims arise out of debt collection actions taken against Plaintiff. *See Espinda v. Cardoza*, 4:23-cv-5023-MKD (E.D. Wash. Feb. 21, 2023); *Espinda v. Hohenberg*, 4:23-cv-5155-MKD (E.D. Wash. November 21, 2023); *Espinda v. Wasson*, 4:23-cv-5032-MKD (E.D. Wash. Oct. 16, 2023). Plaintiff filed the Complaint and Motion for

1 Temporary Restraining Order (TRO) in the instant case on November 21, 2023.
2 ECF Nos. 1, 3. The Court denied Plaintiff's Motion for TRO on December 5,
3 2023. ECF No. 5. On January 4, 2024, Plaintiff filed a Motion to Recuse and
4 Motion to Reinstate TRO, ECF No. 15, and a "Notice of Investigation Demand,"
5 ECF No. 16. The Court denied the Motion to Recuse and Motion to Reinstate
6 TRO, ECF No. 21. Defendants Judge Burrowes, Meyler, Hohenberg, and
7 Bertolino have filed Motions to Dismiss. ECF Nos. 12, 23, 24, 25. Plaintiff filed
8 an "Answer to Dismissal," and Second Motion to Recuse, ECF No. 27, which the
9 Court construes as a response to the four motions to dismiss. Defendants
10 Croskrey, Clark, and Kiddy have not appeared in the case.

11 **B. Allegations**

12 Plaintiff contends Defendants have engaged in "banking fraud," resulting in
13 Plaintiff receiving a notice of foreclosure for her home. ECF No. 1 at 10. Plaintiff
14 seeks an order postponing all further actions against her in the foreclosure of her
15 home. *Id.* at 10, 13. Plaintiff also contends Defendant Croskrey engaged in a ruse
16 with Defendant Kiddy to steal Plaintiff's car and alleges Defendant Croskrey
17 kidnapped her. *Id.* at 11, 14. Plaintiff contends Defendants Judge Burrowes and
18 Meyler caused an unlawful order to be entered, authorizing the Sheriff's
19 Department to unlawfully enter Plaintiff's home. *Id.* at 12. Plaintiff contends
20 Defendants are conspiring against her. *Id.* at 13. Plaintiff alleges Defendant

1 Bertolino has engaged in retaliation against her. *Id.* Plaintiff also contends
2 Defendant Clark created a warrant that caused Plaintiff to be “kidnapped and
3 detained” against her will. *Id.* at 14

4 **LEGAL STANDARD**

5 To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain
6 sufficient factual matter, accepted as true, to “state a claim to relief that is plausible
7 on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Threadbare recitals of
8 the elements of a cause of action, supported by mere conclusory statements, do not
9 suffice.” *Id.* In considering a motion to dismiss for failure to state a claim, the
10 Court must accept as true the well-pleaded factual allegations and any reasonable
11 inference to be drawn from them, but legal conclusions are not entitled to the same
12 assumption of truth. *Id.* A complaint must contain either direct or inferential
13 allegations respecting all the material elements necessary to sustain recovery under
14 some viable legal theory. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562
15 (2007). “Factual allegations must be enough to raise a right to relief above the
16 speculative level.” *Id.* at 555.

17 “Dismissal can be based on the lack of a cognizable legal theory or the
18 absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri*, 901
19 F.2d at 699. Although *pro se* pleadings are held to less stringent standards than
20 those prepared by attorneys, *pro se* litigants in an ordinary civil case should not be

1 treated more favorably than parties with attorneys of record. *See Jacobsen v.*
2 *Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986).

3 DISCUSSION

4 A. Service

5 Pursuant to Federal Rule of Civil Procedure 4 (Rule 4), the Complaint and
6 summons must be served upon Defendants within 90 days of filing. Fed. Rule Civ.
7 Pro. 4(m). Service is allowed by delivering a copy of the summons and the
8 complaint to the defendant personally; leaving a copy at the individual's dwelling
9 or usual place of abode with someone of suitable age and discretion who resides
10 there; or delivering a copy to an agent authorized by appointment or by law to
11 receive service of process. Fed. R. Civ. P. 4(e). Service may also be accomplished
12 by following state law for serving a summons. *Id.* Washington law requires the
13 same personal service required by Rule 4 or allows service by leaving a copy of the
14 summons and complaint at the party's usual mailing address with a person of
15 suitable age and discretion who is a resident, proprietor, or agent thereof, and by
16 thereafter mailing a copy by first-class mail, postage prepaid, to the person to be
17 served at their usual mailing address. Wash. Rev. Code Ann. § 4.28.080 (16)-(17).
18 Per the local rules, Plaintiff is required to serve the summons and complaint on
19 Defendants and provide proof to the Clerk of Court after service has been
20 accomplished. LCivR 4.

1 Plaintiff provided affidavits of service on February 16, 2024. ECF No. 26.
2 Defendants Croskrey, Clark, and Kiddy have not appeared in this case. Defendant
3 Judge Burrowes, stated in his Motion to Dismiss that he had not been properly
4 served. ECF No. 12 at 7-8. It appears Defendant Croskrey was served at his usual
5 place of abode, ECF No. 26 at 8, however, Defendants Clark and Kiddy were
6 improperly served by substitution at what appears to be their place of work and not
7 at their usual abode, *id.* at 10, 12. Neither the Federal Rules nor Washington law
8 allow a party to serve an individual by leaving a copy of the complaint at the
9 person's place of employment. RCW 4.28.080(17); *Dolby v. Worthy*, 141 Wash.
10 App. 813, 817 (2007) ("An individual defendant cannot be served by serving an
11 employee at defendant's place of business."). Plaintiff does not offer any
12 explanation as to why the parties were not properly served. *See* ECF No. 27 at 2-4.
13 As Plaintiff has not complied with Rule 4 as to Defendants Clark and Kiddy, the
14 claims against Defendants Clark and Kiddy are dismissed. Even if the Court did
15 not dismiss Defendants Clark and Kiddy due to the failure to comply with Rule 4,
16 they would be entitled to dismissal for the reasons discussed *infra*.

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19 **B. Immunity**
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1 Defendant Judge Burrowes contends he is entitled to judicial immunity and
2 immunity under the Eleventh Amendment. ECF No. 12 at 5-8. As to judicial
3 immunity, judges are generally immune from civil liability under Section 1983.
4 *Mireles v. Waco*, 502 U.S. 9, 9-10 (1991). There are two circumstances in which
5 judicial immunity can be overcome: 1) the actions were not taken in the judge's
6 judicial capacity; or 2) the actions were taken without jurisdiction. *Id.* at 11-12.
7 Here, Plaintiff has not alleged facts that would demonstrate Defendant Judge
8 Burrowes is not entitled to judicial immunity.

9 Defendant Judge Burrowes is also entitled to immunity under the Eleventh
10 Amendment. An official sued in their official capacity is entitled to Eleventh
11 Amendment immunity. *Pena v. Gardner*, 976 F.2d 469, 473 (9th Cir. 1992).
12 Plaintiff does not set forth facts to support a finding an exception applies, nor that
13 Defendant has waived immunity. Plaintiff's response does not address Defendant
14 Judge Burrowes' contention. ECF No. 27. Thus, Defendant Judge Burrowes is
15 entitled to judicial immunity, and immunity under the Eleventh Amendment as to
16 the claims against him in his official capacity.

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20 **C. Subject Matter Jurisdiction**

1 Defendants Meyler, Hohenberg, and Bertolino contend the case should be
2 dismissed for lack of subject matter jurisdiction. ECF No. 23 at 5; ECF No. 24 at
3 4-6; ECF No. 25 at 4-6.

4 Although Plaintiff alleges the Court has federal question jurisdiction, ECF
5 No. 1 at 4, it is not clear what federal rights Plaintiff alleges have been violated.
6 As discussed in the December 5, 2023 Order, ECF No. 5, Plaintiff does not clearly
7 set forth a First Amendment claim, and she does not explain how the Fair Debt
8 Collection Practice Act (FDCPA) was violated, nor which portion(s) were
9 allegedly violated. While Plaintiff contends she is presenting criminal and civil
10 claims, Plaintiff may not bring criminal claims. *See, e.g., United States v. Nixon*,
11 418 U.S. 683, 693 (1974). Plaintiff also completed the portion of the civil cover
12 sheet that applies to diversity cases. ECF No. 1-1. However, she has not presented
13 any facts to support a finding that diversity jurisdiction exists.

14 Defendant Hohenberg contends jurisdictional dismissal is appropriate
15 because Plaintiff does not allege a coherent, plausible, and non-frivolous claim that
16 provides a basis for jurisdiction. ECF No 24 at 4-5. Defendants Bertolino and
17 Meyler also contend Plaintiff has failed to establish subject matter jurisdiction.
18 ECF No. 23 at 5; ECF No. 25 at 5-7. Plaintiff's response does not address
19 Defendants' contention. ECF No. 27. As Plaintiff has not presented facts to
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1 support a finding that federal question jurisdiction nor diversity jurisdiction exists,
2 Plaintiff has failed to establish that the Court has subject matter jurisdiction.

3 **D. Failure to State a Claim**

4 Defendants Meyler, Hohenberg, and Bertolino contend Plaintiff has failed to
5 state a claim. ECF No. 23 at 5-6; ECF No. 24 at 6-7, ECF No. 25 at 6-8. A
6 complaint must contain more than “a formulaic recitation of the elements of a
7 cause of action.” *Bell Atl. Corp.*, 550 U.S. at 555. The complaint must plead
8 “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570.
9 Liberally construing the complaint in the light most favorable to Plaintiff, the
10 Court finds that Plaintiff has failed to state a claim upon which relief may be
11 granted. Plaintiff’s Complaint largely addresses claims of criminal actions and
12 does not set forth any facts to support a civil claim. While Plaintiff mentions the
13 First Amendment and FDCPA, she does not support the bare assertions of
14 violations of her rights. Plaintiff’s response does not address Defendants’
15 contention. ECF No. 27. As such, Plaintiff has failed to state a claim.

16 **E. Doctrine Against Claim Splitting**

17 Defendant Meyler contends, in the alternative, that the claims against him
18 should be dismissed because they are duplicative of Plaintiff’s prior claim against
19 him. ECF No. 23 at 6-7 (citing *Espinda v. Meyler*, 4:23-cv-05085-MKD (E.D.
20 Wash. June 8, 2023)). The Court need not reach this issue, as the Court finds

1 Plaintiff has failed to establish subject matter jurisdiction and has failed to state a
2 claim.

3 **F. John Does and Et al.**

4 Plaintiff's Complaint lists "John Does (Investors) 1-10,000" as defendants in
5 the caption. ECF No. 1 at 1. The facts section of the Complaint does not address
6 the investors. *Id.* at 11-14. The investors are not identified in any way, and there
7 are no specific allegations as to the investors. The use of "John Doe" or "Jane
8 Doe" to identify a defendant is disfavored. *Gillespie v. Civiletti*, 629 F.2d 637, 642
9 (9th Cir. 1980).

10 Plaintiff also lists "Et al" in the Complaint caption. ECF No. 1 at 1.
11 Plaintiff is using the abbreviation "et al." inappropriately. *See Ferdik v. Bonzelet*,
12 963 F.2d 1258, 1262 (9th Cir. 1992), *as amended* (May 22, 1992). Plaintiff names
13 additional individuals in the body of the Complaint, who are not listed in the case
14 caption. It is unclear who the "Et al" is intended to apply to. Plaintiff must name
15 all Defendants in the caption of the Complaint. *See Ferdik*, 963 F.2d at 1262.
16 Failing to name all Defendants in the Complaint denies the Court jurisdiction over
17 the unnamed Defendants. Fed. R. Civ. P. 10(a). Plaintiff has failed to state a
18 plausible claim against any of the Doe or unnamed Defendants.

G. Dismissal of Defendant Croskrey

All Defendants except Defendant Croskrey have been dismissed for the reasons discussed herein. Although Defendant Croskrey has not appeared in the case, the Court finds dismissal is appropriate. The Court may dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on its own motion. *See Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir.1987) (“A trial court may dismiss a claim *sua sponte* under [Rule] 12(b)(6). Such a dismissal may be made without notice where the claimant cannot possibly win relief.”). A paid complaint that is “obviously frivolous” may be dismissed *sua sponte*. *Franklin v. Murphy*, 745 F.2d 1221, 1227 n. 6 (9th Cir.1984); see also Fed. R. Civ. P. 12(h)(3).

The Court may also dismiss a complaint by its own motion for failure to comply with Federal Rule of Civil Procedure 8. *Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1131 (9th Cir. 2008). Rule 8 requires a complaint to include a “short and plain statement of the claim,” and “each allegation must be simple, concise, and direct,” and a complaint that is so confusing that its “true substance, if any, is well disguised” may be dismissed on the Court’s own motion. *Id.* (quoting *Gillibeau v. City of Richmond*, 417 F.2d 426, 431 (9th Cir.1969)). A complaint that fails to provide defendants fair notice of the wrongs they have allegedly committed does not comply with Rule 8. *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996).

1 As discussed *supra*, Plaintiff's Complaint fails to state a claim. It also fails
2 to comply with Rule 8, as it largely addresses claims of criminal actions and does
3 not set forth any facts to support a civil claim. While Plaintiff mentions the First
4 Amendment and FDCPA, she does not elaborate on either claim. Plaintiff's
5 Complaint thus fails to provide Defendant Croskrey fair notice of the wrongs he
6 has allegedly committed. The claims against Defendant Croskrey are dismissed.

7 **H. Conclusion**

8 The Complaint is dismissed for the reasons discussed herein. Unless it is
9 clear that an amendment would be futile, a *pro se* litigant must be given the
10 opportunity to amend his complaint to correct any deficiencies. *Noll v. Carlson*,
11 809 F.2d 1446, 1448 (9th Cir. 1987), *superseded by statute on other grounds*, 28
12 U.S.C. § 1915(e)(2), *as stated in Aktar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir.
13 2012). As discussed herein, and in the December 5, 2023 Order, ECF No. 5,
14 Plaintiff's allegations largely relate to alleged criminal actions and have no basis in
15 civil law. Plaintiff has presented no facts to support a finding that any government
16 actors, acting in their official capacity, should not be entitled to immunity under
17 the Eleventh Amendment, nor that Defendant Judge Burrowes should not be
18 entitled to judicial immunity. As Plaintiffs claims appear to be without merit, and
19 the deficiencies cannot be cured, allowing amendment would be futile. Fed. R.
20 Civ. P. 15(a)(2); *Gordon v. City of Oakland*, 627 F.3d 1092, 1094 (9th Cir. 2010)

(citing *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988)). While Plaintiff filed a response to the motions to dismiss, she did not substantively respond to any of the defendants' contentions. ECF No. 27. Plaintiff's failure to substantively respond to the Motions to Dismiss also demonstrates an inability or unwillingness to make necessary amendments. *See Anderson v. Navy Fed. Credit Union*, No. 3:23-CV-05506-DGE, 2023 WL 6481518, at *3 (W.D. Wash. Oct. 5, 2023) (citing *Carrico v. City and Cnty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011)); *see also Bachmeier v. Einerson*, No. 3:23-CV-00179-SLG, 2023 WL 6796213, at *3 (D. Alaska Oct. 13, 2023) (citing *Culpepper v. Biddle*, Case No. CV 18-8826-JFW (GJS), 2018 U.S. Dist. LEXIS 187497, at *8, *11 (C.D. Cal. 2018)). Thus, the case is dismissed with prejudice.

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant Judge Burrowes' Motion to Dismiss, **ECF No. 12**, is **GRANTED**.
2. Defendant Meyler's Motion to Dismiss, **ECF No. 23**, is **GRANTED**.
3. Defendant Hohenberg's Motion to Dismiss, **ECF No. 24**, is **GRANTED**.
4. Defendant Bertolino's Motion to Dismiss, **ECF No. 25**, is **GRANTED**.
5. Plaintiff's Complaint, **ECF No. 1**, is **DISMISSED with prejudice**.

1 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter
2 this Order, provide a copy to *pro se* Plaintiff and counsel, and **CLOSE** the case.

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4 DATED February 21, 2024.

5 *s/Mary K. Dimke*
6 MARY K. DIMKE
7 UNITED STATES DISTRICT JUDGE
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